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No. 84-1391

In the Supreme Court of the United States

OCTOBER TERM, 1984

INDEPENDENT SCHOOL DISTRICT NO. 3 OF BROKEN ARROW, TULSA COUNTY, OKLAHOMA
Petitioner

v.

CARLA R. HELMS
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Is a trainable mentally handicapped child who has not completed a secondary special education program in Oklahoma entitled to receive special education services through age twenty-one to complete a secondary program under The Education of All Handicapped Children's Act, 20 U.S.C. 1401?

TABLE OF CONTENTS

Page

Presented for Review ..... *i*

Statement of the Case 1

Reasons for Denying Writ 10

I. The Tenth Circuit Court of Appeals did not decide a federal question which conflicts with the decisions of this Court 10

II. The Tenth Circuit Court of Appeals did not decide an important question of federal law which has not been settled by this Court 12

Conclusion 13

Certificate of Service 14

TABLE OF AUTHORITIES

CASES: *Page*

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982) 7, 10, 11, 12

UNITED STATES CODE

20 U.S.C. 1401(19) 6, 8, 9

20 U.S.C. 1412(2) (B) 5, 6, 7, 8, 12

20 U.S.C. 1415(b) (2) 2

20 U.S.C. 1415(d) 2

20 U.S.C. 1415(e) 3, 4

UNITED STATES CONSTITUTION

Article VI, Sec. 2 8

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Carla Helms is a mentally retarded handicapped student, classified for school purposes as a Trainable Mentally Handicapped (TMH) student. Carla is now twenty-two years of age. At the time of the commencement of Carla's challenge of her special education program she was nineteen.

In March, 1982, Carla's parents requested of peti-

tioner Broken Arrow School District a Due Process Hearing to consider the appropriateness of the educational program being offered, or lack of an offer, by the school district to Carla for the 1982-83 school year. Specifically, Carla and her parents challenged the school district's refusal to allow Carla to attend school during the 1982-83 school year. The request for a hearing was made pursuant to 20 U.S.C. 1415(b)(2).

A Due Process Hearing was held in April, 1982. Both Carla and the school district presented testimony and documentary evidence, pursuant to 20 U.S.C. 1415(d). There has never been any claim by either party that it was denied the opportunity to fully present to the Due Process Hearing Officer its position. The Hearing Officer, having the opportunity to observe first-hand the testimony of the witnesses, and upon further examination of the documents offered at the hearing, held Carla was to receive two more years of public special education.

In issuing her decision, the Hearing Officer found Carla to be a trainable mentally handicapped student who had received twelve years of public education. It was further found Carla was classified as a tenth grade student for the 1981-82 school year, the school year in which the Due Process Hearing was held. The Hearing Officer found Carla had been classified as a ninth grader in the previous 1980-81 school year. Despite the undisputed fact Carla was listed as a tenth grader, the school district attempted

to graduate Carla in the 1981-82 school year.

The Due Process Hearing Officer held Carla had not completed any secondary educational program and that state regulations allowed a handicapped student such as Carla to attend school from ages birth to twenty-one to complete a secondary program. The Hearing Officer further held that handicapped students in the State of Oklahoma have the same educational opportunities as the non-handicapped and, because the non-handicapped have the right to attend public school until age twenty-one to complete a secondary program, Carla has the same right. The Hearing Officer stated if a non-handicapped student were classified as a tenth grade student, the student would receive two additional years of education to complete a secondary program. Therefore, Carla should receive two more years of of public education.

The school district appealed this decision to the Oklahoma State Department of Education Appeal Team Review Board. In July, 1982, the Appeal Team reversed the Hearing Officer's decision and held the school district had completed its legal obligation to provide Carla with twelve years of public education, and ordered the district to graduate Carla. No hearing was held, and no additional evidence was presented to the Appeal Team.

Carla appealed the Appeal Team's decision to the United States District Court for the Northern District of Oklahoma pursuant to 20 U.S.C. 1415(e), said appeal

made in August, 1982. The Oklahoma State Department of Education was made a defendant, along with the school district. During the pendency of the District Court proceeding, the school district refused to allow Carla to attend school, despite the requirement of 20 U.S.C. 1415(e) (3) which states:

> "(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement."

Carla was denied a public education by the school district and the State Department of Education for the entire 1982-83 school year.

All parties moved for Summary Judgment, stipulating that there was no dispute as to the material facts. A hearing was held in October, 1982 before the Chief Judge of the Northern District of Oklahoma, H. Dale Cook.

The District Court issued its decision in August, 1983, granting Carla's motion for Summary Judgment and ordering the school district to provide Carla two more years of free appropriate public education to begin with the start of the 1983-84 school year. In issuing its decision, the District Court followed the statutory requirement of 20 U.S.C. 1415(e) (2) by receiving and reviewing the administrative record, by accepting any additional evidence

if offered (none was presented), by basing its decision on a preponderance of the evidence, and by granting such relief as the District Court deemed appropriate.

The District Court based its decision, in part, on the school district's admission, in open court, that Oklahoma State law does not mandate a maximum of twelve years of public special education for persons in Carla's educational classification (TMH), and further, that Carla had not completed a secondary program.

The District Court's decision further relied on 20 U.S.C. 1412(2) (B) which states in pertinent part:

> "In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met: . . .
>
> (2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake in order to assure that . . .
>
> (B) a free appropriate public education will be available . . . for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the re-

> quirements of this clause shall not be applied in any State if application of such requirements would be inconsistent with State law or practice, or order of any court, respecting public education within such age groups in the State" . . .

The District Court held Oklahoma does not fall within the exception set forth above. The Court held Congress's intent was to exempt those states which do not provide public education to any children in the excepted age groups. Oklahoma, by virtue of granting to students the right to attend school from ages birth to twenty-one, does not fall within the exception. The Court found Oklahoma allows non-handicapped children to receive a free public education to complete a secondary program until age twenty-one; therefore, a handicapped child, such as Carla, has the same right. The District Court held that for the school district to deny Carla the opportunity to complete a secondary program, while it allows non-handicapped students the opportunity through age twenty-one to complete a secondary program, is specifically the type of discrimination based on a handicapping condition that the Education for All Handicapped Children's Act of 1975 (20 U.S.C. 1401) was promulgated to end.

Carla was therefore allowed to continue her education for two more years. Due to the school district's stipulation at the District Court hearing that if the Court determined she is entitled to two additional years of educa-

tion the school district would provide such education beyond Carla's twenty-first birthday, the Court held Carla was to receive two more years of public education.

The school district then appealed to the Tenth Circuit Court of Appeals. The Oklahoma State Department of Education sought no appeal of the decision of the District Court. Oral argument was heard before the Court in September, 1984.

On December 19, 1984, the Court of Appeals entered its Opinion, affirming in all respects the decision of the District Court. In entering this Opinion the Court relied in part, as did the District Court, on 20 U.S.C. 1412(2) (B), and found Oklahoma does not fall within the exception. The Court held that to find otherwise would be to infer an intent by Congress to allow states to discriminate against handicapped with regard to *access* to an appropriate public education, an intent which the Court held was clearly contradicted by the legislative history of the Education for All Handicapped Children's Act of 1975 (EAHC), and by this Court's own decision of *Hendrick Hudson Dist. Bd. of Ed. v. Rowley,* 458 U.S. 176, 191-94 (1982).

With regard to the school district's continuous reliance on several state statutes and state Attorney General's Opinions (even now cited by the school district in its Petition for Writ of Certiorari), the Court of Appeals held that these laws and opinions permits local school officials to discriminate against handicapped

children with respect to providing more than twelve years of free public education. The Court notes that even if state law forbade the provision of free, appropriate public education to handicapped children for more than twelve years, so long as non-handicapped children within the three to five and eighteen to twenty-one age groups may be entitled to a free public education, there is not the kind of inconsistency contemplated by the exception in 20 U.S.C. 1412(2) (B). The Court then cites Article VI, sec. 2 of the Constitution of the United States (Supremacy Clause) as cause for the school district's reliance on state laws and state Attorney General's Opinions as being in vain.

The Court then addresses if Carla had completed a secondary program. The Court considers 20 U.S.C. 1401(19):

> "The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specifically designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual *goals,* including short-term instructional *objectives,* (C) a statement of the specific educational services to be

> provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." (Emphasis added by Court).

The Court holds it would be a farce of the clear intent of Congress to interpret this statute as allowing that a handicapped child could fail to meet his or her individualized education program (IEP) objectives and yet advance from grade to grade. As this relates to Carla's IEP, the Court notes she was classified as a tenth grader after twelve years of education, meaning that, if the school district met the statutory requirements of 20 U.S.C. 1401(19) regarding evaluation, Carla had been found to have made unsatisfactory progress, and had, therefore, not completed a secondary program.

The Court of Appeals then reviews the school district's claim of "error" with regard to Carla's grade placement and finds such claims to be without merit. Indeed, the Court agrees with the findings of the District Court that the school district appears to argue that a handicapped child such as Carla is simply moved from grade to grade without any consideration of what benefit the child has received or without regard to the child's

capabilities and potential to further benefit from the educational experience after twelve years have expired.

The Court then examines the school district's claim that the District Court applied a standard contra to *Hendrick Hudson Dist. Bd. of Ed. v. Rowley,* 458 U.S. 176(1982). The Court of Appeals finds this claim to be at best a diversionary tactic and notes it was the school district itself which, at the District Court hearing, first suggested that the question of whether Carla would "benefit" from continued education provided some sort of justification for the school district's decision to end her schooling after twelve years.

The Tenth Circuit Court of Appeals denied the school district's Petition for Rehearing on January 15, 1985. The Court of Appeals then stayed the mandate until March 4, 1985, pending the school districts Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. The Tenth Circuit Court of Appeals did not decide a federal question which conflicts with the decisions of this Court.

The school district in its Petition for Writ of Certiorari claims the Court below issued an opinion contra to this Court's decision in *Hendrick Hudson Bd. of Ed. v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), said contradiction by virtue of the supposed non-

recognition by the Court below of a State to have the power of primacy in the field of public education. Nothing could be further from the truth. The Court of Appeals makes note of, indeed, even relies upon *Rowley* in holding that Carla was entitled to continue her schooling for two more years. As the Court below points out, *Rowley* stands for the prohibition of denial to handicapped children of *equal access* to public education as a State provides for the non-handicapped. How can it be appropriate for a state, like Oklahoma, to make statutory provisions for a non-handicapped student to continue his or her education through age twenty-one in order to allow completion of a secondary program, and then turn around and issue an Attorney General's Opinion that states a trainable mentally handicapped child such as Carla can receive only twelve years of public education period? Anyone may see this is a double standard. A double standard *based solely on a handicapping condition* such as Carla suffers from. This was clearly not the intent of Congress in promulgating the EAHC. The EAHC's intent, as this Court found in *Rowley,* is to provide *equal access* for a handicapped child to public education.

There was nothing held by this Court in *Rowley* concerning the primacy of a State in the field of public education which allows a State to deny equal access for handicapped children regarding a free appropriate public education. Indeed, *Rowley* stands for the proposition a State may not deny to a handicapped child that access to

education which is afforded a non-handicapped child. To allow the State of Oklahoma and the petitioning school district to have two standards for access to public education is clearly a violation of *Rowley* and of the EAHC.

II. The Tenth Circuit Court of Appeals did not decide an important question of federal law which has not been settled by this Court.

As both the District Court and the Court of Appeals below cited in each's respective decision, and the school district's Petition for Writ of Certiorari cites, the federal question of whether Carla is or is not entitled to two more years of education hinges, in part, upon interpretation of 20 U.S.C. 14(2) (B). This statute concerns *equal access* for a handicapped child to public education in the age groups of three to five and eighteen to twenty-one. As pointed out above, both courts below held the school district's position that Carla should be denied further education because of her having twelve years of education is clearly contrary to the EAHC, in that non-handicapped students in Oklahoma may continue receiving public education through age twenty-one to have the opportunity to complete a secondary program.

This case is ultimately a question of Carla having equal access to a public education, the same access as is being provided to the non-handicapped. This Court has held in *Rowley* that to allow states to discriminate against

handicapped children with regard to their access to public education is clearly contradictory to the legislative intent and history of the EAHC. What could be more discriminatory than to allow a State to have non-handicapped students be afforded the opportunity to complete a secondary program through age twenty-one, and to then deny the same opportunity to a handicapped child? It seems obvious this Court has already held this type of practice may not be condoned.

CONCLUSION

For the foregoing reasons, Respondent Carla Helms respectfully requests that the judgments and orders of the District Court and the Court of Appeals below be affirmed, and further, that Petitioner's request for Writ of Certiorari be denied.

Respectfully submitted,

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March, 1985

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CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the above and foregoing RESPONDENT'S BRIEF was, on this 22nd day of March, 1985, mailed, postage pre-paid to:

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